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The Border Papers

Dispute Settlement in the NAFTA:

A Surprising Record of Success

Patrick Macrory

In this issue...

A Washington trade lawyer discusses the way in which appeals of US antidumping and countervailing duty decisions against Canadian products — including the controversial softwood lumber case — have been handled under the special mechanism provided by the North American Free Trade Agreement.

The Study in Brief

Chapter 19 — that part of the North American Free Trade Agreement (NAFTA) dealing with antidumping (AD) and countervailing duty (CVD) actions — permits parties to appeal actions brought by one NAFTA member against imports from another to a special binational panel instead of to the domestic courts of the country bringing the action. It has been quite effective in curbing what Canadians believe to be the overzealous enforcement of AD and CVD laws by US authorities, and Chapter 19 panels have frequently ordered US duties to be reduced. In two important cases, including a CVD case involving softwood lumber, panels directed that the orders be lifted, resulting in the saving of hundreds of millions of dollars of duties.

Canada's goal of eventually eliminating the application of AD and CVD laws to its trade with the United States is simply not realistic in the foreseeable future, no matter how much economic sense it may make in the context of a free trade area. The Bush administration's protectionist actions speak far louder than its free trade words and Congress jealously protects the right of US industries to invoke AD and CVD laws against imports from all sources, including that country's NAFTA partners. Even relatively modest steps to alleviate the impact of such laws on imports from Canada seem out of reach in the current climate. Canada's only recourse is to fight AD and CVD cases hard and to take advantage of its right to appeal adverse decisions under both Chapter 19 and the appeal procedures of the World Trade Organization (WTO).

There is, however, one bright spot. Since the creation of the NAFTA, Canada and Mexico have been subject to far fewer AD and CVD investigations and orders by the United States than have other countries, proportionate to trade volume. Apart from softwood lumber, only six other Canadian products are now subject to such orders, and trade volumes and duty levels are quite low in each case.

Unfortunately, Canada's 1993 victory in the Chapter 19 softwood lumber appeal did not prevent the US industry from filing a new case under more relaxed standards provided by Congress. Canada views recent decisions imposing duties of nearly 30 percent in that and a companion AD case as deeply flawed and heavily influenced by domestic US politics. However, Chapter 19 (and WTO appeals), which Canadian interests have already invoked, may again provide Canada's softwood lumber industry with a remedy.

The Author of This Issue

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Canada has had many trade disputes with the United States, by far its largest trading partner. A large number of these disputes have centred on what Canadian politicians and government officials believe to have been overzealous enforcement by the United States of its import-relief laws. However, the dispute-resolution mechanism set up to handle appeals from decisions under these laws, which was first established in the Canada-US Free Trade Agreement (FTA) of 1988 and then made permanent in the North American Free Trade Agreement (NAFTA) in 1993, has provided a fairly effective check against some of the US excesses.

The NAFTA contains two principal dispute-resolution mechanisms. One is Chapter 19, described as the "centerpiece"of the FTA (United States 1988), which concerns appeals of antidumping (AD) or countervailing duty (CVD) rulings (see Box 1). Under Chapter 19, parties to a case brought in one NAFTA country against imports from another can appeal the decision to an *ad hoc* binational panel, rather than to the domestic courts of the country whose agency made the ruling.[1] The other principal NAFTA dispute-resolution mechanism is contained in Chapter 20, which creates a method of handling disputes between member countries arisng out of the agreement itself.[2]

Overall, Chapter 19 has proved quite successful over the past 14 years. It has not, however, been an unvarnished success. Delays have crept into the process in recent years (although so far these have been more serious in cases involving Mexico rather than those involving Canada).

In addition, Chapter 19 has been unable to contain all AD and CVD disputes between Canada and the United States. The most obvious example is the controversy over softwood lumber. As detailed later in the paper, there have been four US countervailing duty investigations (CUD) of softwood lumber from Canada since 1982. Although the Chapter 19 process did result, in 1993, in a reversal of the countervailing duty order issued in the third investigation as well as the repayment of hundreds of millions of dollars of duties, it did not prevent Congress from amending the law to lower the bar or the US Department of Commerce from launching new AD and CVD investigations in 2001. Those investigations resulted in the imposition, in May 2002, of AD and CUDs of up to 30 percent on Canadian imports — decisions viewed in Canada as grotesquely unfair. Nonetheless, Canadians who believed that the 1993 panel victory would put an end to the long-festering lumber war had unrealistically high expectations. All that Chapter 19 is designed to do is to provide an alternative avenue of appeal from administrative disputes, and it has served this function well. The process worked in the third lumber investigation and the Canadian parties have already appealed the latest decisions under Chapter 19.

As a trade lawyer, I have worked on behalf of Canadian interests in a number of antidumping and countervailing duty cases, including the four countervailing cases against softwood lumber from Canada, discussed later in this paper. The views expressed here are, of course, my own, and not those of the clients. I am very grateful to Alan Alexandroff for his helpful suggestions on this paper.

1 Chapter 19 allows a government as well as a private party to challenge a CVD decision under domestic law, since the government is automatically a party to the agency proceedings.

2 Separate dispute-resolution procedures govern the Side Agreements on Environment and Labor. Also, NAFTA Chapter 11 sets up a special procedure for disputes between private investors and member governments.

Box 1: *Antidumping and Countervailing Duty Laws*

An *antidumping (AD) law* provides for the imposition of additional duties on an imported product that is sold below its "normal value" (usually the home-market price of an identical or similar product) or below its cost of production. A *countervailing duty (CVD) law* imposes additional duties to offset certain types of subsidies provided to the foreign producer by its government.

In both cases, duties can be imposed only when an authorized government agency has found that the dumped or subsidized imports are causing or threaten to cause material injury to a domestic industry. In the United States, the finding of dumping or subsidization is made by the Department of Commerce and the finding of injury by the International Trade Commission. In Canada, the findings are made by the Commissioner of Customs and Excise and by the Canadian International Trade Tribunal, respectively.

Despite the high Canadian sensitivity toward the United States' AD and CVD laws, only six Canadian products other than softwood lumber are currently subject to AD and/or CVD orders, and in most of those cases the volume of trade involved is small and the current duty level low. Although even the threat of an AD or CVD investigation can inhibit trade, the fact is that, between 1994 and June 2002, the United States conducted just 13 such investigations of imports from Canada, only three of which resulted in orders (two being the AD and CVD actions on softwood lumber). Most of the current Chapter 19 reviews involving Canadian imports to the United States are of duty assessments under relatively old orders from a time in which the number of US investigations and orders with respect to Canadian imports was much higher than it is now. Since the creation of the NAFTA, imports from Canada and Mexico have been subject to far fewer investigations and orders than imports from other parts of the world, perhaps as a result of the increased integration of their economies with that of the United States.

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Outline of the *Commentary*

Because Chapter 19 was designed to alleviate Canadian concerns about the administration of US import-relief laws and because the most controversial Chapter 19 decisions have involved US cases, I focus in this *Commentary* on the way the system has dealt with appeals from US agency decisions. It begins with a more detailed explanation of the United States' AD and CVD laws and Canadian concerns about their application. I then turn to the effect these concerns had on the negotiation of the FTA and the creation of the Chapter 19 procedures.

Next comes a detailed discussion of how these procedures have worked under the NAFTA and under their previous incarnation in the FTA. The focus is on the three most controversial panel decisions, involving pork, swine, and softwood lumber.

After this more-or-less chronological account, I discuss the interplay between dispute resolution under Chapter 19 and under the WTO dispute-settlement system. I then evaluate the NAFTA system using various criteria, such as the standard of review, fairness and perceived fairness, timeliness, and the possibility of national bias. I end by concluding that, although Canada's ultimate goal of eliminating the application of AD and CVD laws to Canada-US trade is out of the question in the

foreseeable future, as are even modest steps to alleviate their impact, the Chapter 19 system has provided Canada with a useful safety valve and can continue to do so in the future.

Canadian Concerns about the United States' AD and CVD Laws

The United States' AD and CVD laws can create significant barriers to imports and are formidable weapons in the hands of US producers who wish to limit foreign competition.

The US AD and CVD laws, which are designed to offset the effect of unfairly priced or subsidized imports, can create significant barriers to imports and are formidable weapons in the hands of US producers who wish to limit foreign competition.[3] The US government has conducted well over a thousand AD and CVD investigations since 1980, when the present law was enacted in substantially its current form, and nearly three hundred AD and CVD orders are currently in place. Since 1980, exports from Canada to the United States — by far its largest trading partner — have been subject to more than 60 investigations, resulting in more than 20 orders, although as a result of revocations only ten are now in effect.[4] An almost identical number of investigations against imports from Mexico has resulted in 23 orders, of which only nine are now in effect.[5]

At the time of the initial free trade discussions, many Canadians believed that the system was biased in favour of the complaining US industries. In particular, they felt that the Commerce Department, which is responsible for determining whether dumping or subsidization is taking place, frequently appeared to favour the US industry's point of view and that the courts were failing to exercise sufficient oversight of the department's actions. Matters came to a head when the controversial matter of softwood lumber, involving billions of dollars of exports from Canada to the United States, resulted in two apparently inconsistent CVD decisions by the department (in 1983 and 1986).[6]

The FTA Negotiations

Because of the concerns described above, one of Canada's major objectives in the FTA negotiations was to eliminate — or at least ameliorate — the AD and CVD laws with respect to trade between the two countries.[7] But US negotiators realized that Congress views the AD and CVD laws as extremely important protection for domestic industries and would never accept an agreement that called for substantive changes to those

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3 The investigations are lengthy (lasting up to one year), time-consuming and expensive, and they create a great deal of uncertainty among importers, who are required to pay any duties that are ultimately assessed. Once an order is entered, the Commerce Department conducts annual reviews in most cases to determine the amount of duties payable. These reviews can be as burdensome as the original investigations.

4 The orders only cover seven products, three of which are subject to both AD and CVD orders.

5 As discussed later in this paper, the number of orders entered against Canada and Mexico has dropped sharply since the NAFTA came into effect.

6 The various phases of the softwood lumber decision are discussed later in this *Commentary*.

7 An extensive literature on the negotiations is available. Among some of the best works are Doern and Tomlin 1991; Hart with Dymond and Robertson 1994; and Ritchie 1997.

laws.[8] Progress seemed impossible. Two weeks before the deadline, the Canadians walked out of the negotiations over this issue, which they regarded as a dealbreaker. A compromise was struck at the last minute. In deference to Canadian concerns that judicial oversight of the United States' administration of its AD and CVD laws was inadequate, a special mechanism would be set up allowing the parties to AD and CVD cases to take appeals to a binational panel specially constituted for the purpose, instead of to the domestic courts. This measure was intended to be temporary, pending the development within seven years of special rules to substitute for the AD and CVD laws on trade between the two countries.

The Canadian negotiators believed that the new dispute-resolution procedures would result in more rigorous review of the agency decisions, since the panels would be composed of trade law experts familiar with the intricacies of AD and CVD law and practice. Panellists, the negotiators hoped, would be more alert to agency errors than the judges of the US reviewing courts, some of whom had had little more than a passing acquaintance with trade law before their appointment to the bench. And the US agencies, knowing that their decisions would come under greater scrutiny than in typical court reviews, could be expected to take more care in reaching their conclusions. In addition, the process would make reviews faster and less costly because, unlike the US courts, the Chapter 19 panels would be required to operate within strict time limits and in most cases the two levels of appeal available as of right in the US system would be replaced by a single review.

The US negotiators believed that faster resolution of AD and CVD cases would lessen trade friction between the two countries.

For their part, the US negotiators believed that faster resolution of AD and CVD cases would lessen trade friction between the two countries. And with the panels required to apply the domestic law of the country where the decision was under challenge,[9] the panel process should produce the same results as review by the courts. The possibility of review by Extraordinary Challenge Committees (ECCs) in extreme cases would ensure that panels did not stray from the proper bounds of review or otherwise misconduct themselves.

The NAFTA Negotiations

In the early 1990s, when Mexico joined Canada and the United States in negotiating the NAFTA, it too had serious concerns about the apparent arbitrariness of US AD and CVD proceedings. For example, Mexico had obtained a favourable ruling from a General Agreement on Tariffs and Trade (GATT) panel against a US antidumping finding on cement, a major Mexican export to the United States; the panel had recommended the revocation of the AD order.[10] However, the United States blocked adoption of the panel report (as was possible under the old GATT dispute-resolution system) with the result that the order has remained in place and

8 Some free trade agreements, such as those between Australia and New Zealand and between Canada and Chile, do eliminate AD and CVD laws with respect to trade between the parties.

9 To guard against the danger that panels would create their own body of law, panels were directed to follow applicable domestic law precedent, and panel decisions themselves would not constitute precedent for subsequent panels.

10 *United States — Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico* ADP/82 (1992).

hundreds of millions of dollars have been paid in AD duties on US imports of Mexican cement.

Thus, like Canada, Mexico regarded incorporation of Chapter 19 into the NAFTA as a fundamental objective of the negotiations. In return, it agreed to make significant procedural changes to its AD and CVD laws to incorporate basic common law notions of fair play and due process. Chapter 19 of the NAFTA differs only in minor respects from its FTA predecessor.

Although the FTA called for discussions of a modified AD and CVD regime to govern trade between Canada and the United States, they had led nowhere. The matter was quietly dropped. The new tripartite accord included no such provision, and there is no indication in the agreement or the negotiating history that the Chapter 19 procedures are now intended to be anything but permanent.

Chapter 19 Procedures

In the United States, AD and CVD investigations normally begin with the filing of a petition on behalf of a domestic industry.

In the United States, AD and CVD investigations normally begin with the filing of a petition on behalf of a domestic industry. The Commerce Department carries out an investigation to determine whether dumping or subsidization is taking place; the International Trade Commission (ITC), an independent agency of the US government, decides whether the domestic industry is being injured or threatened with injury by the imports in question. If both agencies make affirmative determinations, an AD or CVD order is entered. Thereafter, all imports that enter the country must be accompanied by cash deposits and the Commerce Department will, on request, conduct administrative reviews each year to determine the current rate of dumping or subsidization.

Final determinations by the Commerce Department and the ITC in initial investigations and in administrative reviews may be appealed to the US Court of International Trade (CIT). But its review power is limited. The relevant statute, *The Tariff Act of 1930*, as amended, provides that the CIT must uphold the agency decision unless it is "unsupported by substantial evidence on the record or otherwise not in accordance with law" (section 516A(b)(1)(B)). The CIT may not second guess an agency's reasonable interpretation of the law or the facts. CIT decisions can, in turn, be appealed to the US Court of Appeals for the Federal Circuit (CAFC). The US Supreme Court has discretion to review CAFC decisions, but in practice it rarely takes appeals involving trade issues.

Chapter 19 of the NAFTA provides an alternative route of appeal. A party to an AD or CVD case brought in one NAFTA country and involving imports from another can opt for review by a binational panel, instead of by the national courts. A panel of five experts is chosen from a roster of at least 75 (at least 25 from each NAFTA country).[11] Each party involved selects two panel members; the fifth is chosen by the two governments, or, in the absence of agreement, by one of the governments chosen by lot. The various stages of the panel proceedings are subject to strict time

11 Roster members "shall be of good character, high standing and repute, and shall be chosen strictly on the basis of objectivity, reliability, sound judgment and general familiarity with international trade law." They need not be lawyers, but lawyers must constitute a majority of each panel. (NAFTA, Annex 1901–2.)

limits: the first panel opinion is to be issued within 315 days of the filing of the appeal, with any remand proceedings to be completed as quickly as possible.

Panels operate under procedures similar to court rules. They can only affirm agency decisions or remand (return) them with instructions to revise them; they have no power to alter the decisions themselves.[12] Since the panels are designed to replace domestic courts, they are required to apply the domestic law of the country of the agency whose decision is being appealed and to apply the same standard of review that would be applied by a national reviewing court. Panel decisions are binding only on the parties to the dispute and do not create binding precedents for other panels.

Panel decisions can be appealed to an ECC composed of three sitting or retired judges, but only on grounds that a panellist has violated specified rules of conduct, that the panel has seriously departed from a fundamental rule of procedure, or that the panel has manifestly exceeded its powers, authority, or jurisdiction. Moreover, an ECC can set aside a panel decision only if it finds that the transgression materially affected that decision and threatens the integrity of the panel process.

Chapter 19 in Practice

Almost every appeal of a US decision involving Canadian or Mexican imports has been taken to a Chapter 19 panel rather than to the CIT.

The Chapter 19 procedures have been used extensively, both under the FTA and under the NAFTA. Indeed, almost every appeal of a US decision involving Canadian or Mexican imports has been taken to a Chapter 19 panel rather than to the CIT. Between 1994 and mid-2002, 23 FTA and NAFTA panel reviews of US agency decisions involving Canadian imports and eight reviews of decisions involving Mexican imports were completed.[13] A 1995 study conducted by the US General Accounting Office (GAO) of the FTA decisions shows that the process had substantially raised the rate of appeal of Commerce Department decisions (United States 1995a). During the four years before implementation of the FTA, only about 20 percent of the department's decisions involving Canadian products were appealed to the CIT. The rate of Chapter 19 appeals during the next five years was more than double, almost 50 percent.

The Chapter 19 panels have been fairly aggressive. Of the 26 reviews of Commerce Department determinations completed under the FTA and the NAFTA through May 2002, only five were upheld without a remand. All five were AD cases. Every Commerce Department decision in a CVD case was remanded. Sometimes, after a remand to the agency requested that it clarify the reasoning behind its decision, the panel was satisfied with the explanation and upheld the decision. However, many of the remands resulted in reduction of the duties and, in two cases, outright elimination of them.[14] Thus, of 18 panel reviews of Commerce Department decisions

12 In practice, however, panels have achieved this result by remanding to the agency with specific directions to issue a negative determination. See *Certain Softwood Lumber Products from Canada*, USA-92-1904-01 (hereafter referred to as *Lumber III*), Second Panel Decision, December 17, 1993; and *Fresh, Chilled or Frozen Pork from Canada*, USA-89-1904-11, Second Panel Decision, January 22, 1991 (hereafter referred to as *Pork*). Both decisions are discussed below.

13 One of the decisions involving Mexican imports is currently subject to an Extraordinary Challenge.

14 One of the two involved a Commerce Department ruling, the other an ITC decision.

involving Canadian imports, 12 resulted in a reduction in duties — in some cases, admittedly small — and one *(Lumber III)* in rescission of the order and elimination of the duties altogether. Five of the eight reviews of Commerce Department decisions involving Mexican imports resulted in a reduction in duties, in several cases quite substantial.[15] One case, however, resulted in a significant *increase* in duties.

Of the five panel reviews of ITC decisions (all affirmative decisions involving imports from Canada), one (*Pork*) resulted in an outright reversal and therefore rescission of the order and elimination of duties. A panel reviewing the ITC injury finding in the third softwood lumber case remanded the decision to the agency no less than three times and would almost certainly have directed the ITC to issue a negative determination had the appeal not been mooted by the action of the panel in the review of the Commerce Department decision in the same case.

Contentious Decisions

Despite the active role the Chapter 19 panels have played, the majority of the decisions involving the US AD and CVD determinations have been relatively uncontroversial. In part, at least, this lack of controversy is because the majority of reviews of Commerce Department decisions — 21 out of the total 26 — have involved AD rather than CVD decisions. Since AD cases involve the actions of private companies, not governments, they tend to generate less contention than CVD cases, except where the volumes of trade are very large. CVD cases, on the other hand, involve direct challenges to government programs and, therefore, often create considerable tension between the two countries involved. It is no coincidence that the three most contentious panel decisions, each of which was subject to an Extraordinary Challenge, involved CVD cases.[16] Each also concerned a product with a large volume of trade, and the relevant US industries enjoyed strong political support.

Since AD cases involve the actions of private companies, not governments, they tend to generate less controversy than CVD cases.

Pork

Fresh, Chilled, or Frozen Pork from Canada[17] was an appeal from a finding of threat of injury by a 3–2 majority of the ITC in a CVD case. The basis for the finding was a prediction of an increase in Canadian pork production, which the ITC believed would all be exported to the United States. In its first decision, issued on August 24, 1990, the Chapter 19 panel concluded that the finding was not supported by the evidence; indeed, the figures indicating an apparent increase in production were the result of a statistical error caused by a change in the method of counting — a

15 In one case, the two exporters who had appealed were exempted from duties as a result of the panel review. In two other cases, the margin reductions were from 39 percent to 18 percent and from 74 percent to 45 percent, respectively (the latter case is now subject to an Extraordinary Challenge.)

16 The first Extraordinary Challenge involving an AD case was filed by the United States in 2000, against a panel decision on an administrative review of an AD order against cement from Mexico. The proceedings have been delayed, reportedly as a result of Mexico's failure to appoint a member of the committee.

17 ECC-91-1904-01 USA (1991).

fact that the US Department of Agriculture had pointed out to the ITC and that the US industry had acknowledged. According to one panellist, "[N]ot only were there inaccuracies in the interpretation of basic production data underlying the [ITC] majority opinion, but, in addition, there are a number of areas in which there were, in my opinion, an incompleteness in the analytic logic which links cause (various factors) and effect (threat of injury)."[18]

On remand, the ITC — this time by a 2–1 vote — came up with a new theory to justify its finding of threat of injury. According to the majority, a recent increase in the amount of subsidies paid on hogs in Canada would lead to an increase in the CVD rates imposed on exports of hogs to the United States; the concern about the increase in the rates would cause more hogs to be sold to Canadian pork producers than to their US counterparts, which would, in turn, lead to increased exports of pork to the United States. The panel found that the commission's theory was mere conjecture, lacking in evidentiary support, since the number of hogs exported to the United States had actually risen after the increase in the subsidy. On January 22, 1991, the panel remanded the case to the ITC for a second time, this time with instructions to issue a negative determination. The agency grudgingly complied with the directive but, in doing so, issued a provocative statement accusing the panel of improperly weighing evidence and failing to apply the correct standard of review.

The United States filed an Extraordinary Challenge, claiming that the panel had improperly reached its own judgment on the evidence, instead of simply determining whether the record contained enough evidence to support the ITC's decision. The ECC unanimously rejected the US claim. The Extraordinary Challenge process was not, it observed, designed to function as a routine appeal but was intended simply as a safeguard against an impropriety or gross error that could threaten the integrity of the binational panel review process. Provided that the panel had articulated the correct standard of review and that it had conducted an analysis of the pertinent facts in the record to apply that standard, its decision must be upheld. Applying this test to the decision before it, the ECC had little difficulty in rejecting the US claims.

Swine

The appeal of Live Swine from Canada *involved specificity, the most difficult and contentious issue that has arisen under the United States' CVD law.*

The appeal of *Live Swine from Canada*[19] involved specificity, the most difficult and contentious issue that has arisen under the United States' CVD law. Governments provide many kinds of assistance to industry. To ensure that the CVD law is not applied to generally acceptable forms of assistance, such as education, police protection, and highway construction, it provides that domestic subsidies — those that are not linked to exports[20] — are countervailable only where they are provided to "a specific enterprise or industry, or group of enterprises or industries" (section 1677(5)(A)(ii)). A draft Commerce Department regulation stated that, in determining whether a particular program was specific, the department would consider, among other things, four enumerated factors: the extent to which the government limited

18 *Pork*, USA-89-1904-11, decision of August 24, 1990, p. 36.

19 ECC-93-1904-01 USA (hereafter referred to as *Swine EC*).

20 Export subsidies are always countervailable under US law.

the availability of the program; the number of enterprises, industries, or groups of enterprises or industries that actually used the program; whether a program had dominant users or certain enterprises, industries, or enterprise or industry groups received disproportionately large benefits under it; and the extent to which the government exercised discretion in conferring benefits under the program.

In an administrative review of a CVD order covering swine, the Commerce Department had found that two agricultural programs were specific and, therefore, countervailable. That finding was based solely on the fact that the actual number of recipients of benefits under the programs was small compared with the universe of potential beneficiaries. On appeal, the Chapter 19 panel rejected the Commerce Department's finding, holding that under its own proposed guidelines, as well as applicable case law, the department had to consider *all* of the factors enumerated in the proposed regulation. Quoting the department's own statement that "the specificity test cannot be reduced to a precise mathematical formula," the panel noted that the department had done precisely that by basing its finding of specificity on the sole fact that the number of recipients was small.[21] One of the US panellists issued a strong dissenting opinion in which he accused the majority of advancing its own interpretation of the CVD law, rather than deferring to the department's interpretation of the statute and its own proposed regulations. (It is fair to say that although the case law on the issue could be read as supporting the majority view, it was by no means clear-cut.)

The United States filed an Extraordinary Challenge, once more alleging that the panel had breached its mandate by failing to apply the proper standard of review. The ECC unanimously upheld the panel in a short opinion. It reiterated that the Extraordinary Challenge procedure was not a normal appeal process but a "safety valve in those extraordinary circumstances where a challenge is warranted to maintain the integrity of the binational panel process."[22] Provided that the panel had conscientiously applied the proper standard of review, it had acted within its mandate. In an unsatisfactorily short discussion of the facts of the case, the committee stated that although it felt the panel might have erred, it was not persuaded that the panel had failed to apply the properly articulated standard of review. Unfortunately, the committee made no attempt to explain where the line lay between a mere panel error and failure to apply the correct standard of review.

Softwood Lumber

Lumber III was the third episode in one of the longest drawn-out and most bitter trade disputes between the United States and Canada.

By far the most contentious Chapter 19 proceeding, *Lumber III*[23] was the third episode in one of the longest drawn-out and most bitter trade disputes between the United States and Canada (see Box 2). The principal issue in all the softwood decisions was whether stumpage fees charged by Canadian provincial governments to private companies for the right to cut timber on provincial land were too low and therefore constituted a subsidy.[24]

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21 *Swine* USA-91-1904-3, decision of August 19, 1992, p. 18.

22 *Swine* EC, p. 8.

23 ECC-94-1904-01 USA (hereafter referred to as *Lumber III* EC).

24 In Canada, the provincial governments own most standing timber; in the United States, by contrast, the majority is privately owned.

Box 2: *The Softwood Lumber Cases*

The long-running trade dispute with the United States over softwood lumber is often described in the Canadian media, but the multitude of cases dealing with it can be confusing for people who do not consider them day by day. For convenience, they are often given Roman numerals. Here is a list.

- *Lumber I* (*Certain Softwood Lumber Products from Canada*, 48 Fed Reg 24, 159 [1993]). The US Department of Commerce issued a decision that provincial stumpage was not a subsidy.
- *Lumber II* (*Certain Softwood Lumber Products from Canada*, 51 Fed Reg 37, 483 [1986]). The Commerce Department issued a preliminary determination that provincial stumpage was a subsidy, but the issue was made moot by a Canada-US memorandum of understanding under which Canada imposed a 15 percent duty on exports to the United States.
- *Lumber III* (*Certain Softwood Lumber Products from Canada*, 57 Fed Reg 22, 570 [1992]). The Commerce Department found that provincial stumpage and log export restraints were subsidies. The finding was reversed by a Chapter 19 panel: *Certain Softwood Lumber Products from Canada*, USA-92-1904-01 (1993). The panel decision was upheld by an ECC: *Certain Softwood Lumber Products from Canada*, ECC-94-1904-01USA (1994).
- *Lumber IV* (*Certain Softwood Lumber Products from Canada*, 67 Fed Reg 15, 545 [April 2, 2002] and 67 Fed Reg 15, 539 [April 2, 2002]). The Commerce Department found that provincial stumpage was a subsidy and that softwood lumber was being dumped in the United States. The decisions are now on appeal to Chapter 19 panels and the WTO.

In the first investigation (*Lumber I*), concluded in 1983, the Commerce Department concluded that stumpage was not a countervailable subsidy, both because it was not provided to "a specific enterprise or industry, or group of enterprises or industries," as required by the CVD law[25] and because the stumpage systems did not provide goods at preferential rates, as also required by the CVD law at that time. However, in 1986, in a preliminary determination on a second investigation (*Lumber II*), the department reversed itself on both issues and found a 15 percent subsidy, despite the lack of any material change in the nature of the stumpage systems or the number and type of industries using stumpage.[26] The department's change of heart was rumoured to have been politically motivated. The rather obvious inconsistency of the two decisions, involving an enormously important Canadian export, simply confirmed Canadians' belief that the system was biased, and was one of the factors that led Canada to negotiate the FTA.

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25 *Certain Softwood Lumber Products from Canada*, 48 Fed Reg 24,159, 1983 (hereafter referred to as *Lumber I*). The department found that stumpage was used by many companies operating within three groups of industries.

26 *Certain Softwood Lumber Products from Canada*, 51 Fed Reg 37483, 1986 (hereafter referred to as *Lumber II*). The Canadian parties did not have the opportunity to test the legality of the Commerce Department's decision on appeal because, before a final determination was issued, the Canadian government settled the case by negotiating the memorandum of understanding described in the text. Preliminary subsidy determinations cannot be appealed to the CIT.

Rather than face the likelihood of a final affirmative decision and the entry of an order in *Lumber II*, the Canadian government decided to enter a memorandum of understanding with the US government and impose a 15 percent export tax as an offset to the alleged subsidies. Although the tax would have had the same inhibiting effect on exports as would a countervailing duty, this approach meant that the tax revenue remained in Canadian hands. In 1991, after changes in several of the provincial stumpage systems had apparently eliminated the alleged subsidies, the Canadian government terminated the memorandum of understanding. The Commerce Department responded by almost immediately self-initiating a new CVD investigation and imposing temporary duties under Section 301 of the *Trade Act of 1974*.[27] At the conclusion of the investigation, the department found that stumpage was specific and that it was provided at preferential rates. It also found that restrictions the British Columbia government imposed on exports of logs constituted a subsidy because those restrictions purportedly lowered the cost of logs to lumber producers in the province.[28]

The Commerce Department found that restrictions the British Columbia government imposed on exports of logs constituted a subsidy.

The Canadian parties appealed to a binational panel composed of three Canadians and two Americans. In their first decision, which was unanimous, the panel members, using similar reasoning to that of the majority in *Swine*, concluded that the Commerce Department's decision on specificity was incorrect since it was based on only one of the four factors the department listed in its proposed regulations for determining specificity, which had been endorsed by a recent decision of the CAFC. The panel remanded the case to the department with a direction that it evaluate all four factors with respect to stumpage and log export restrictions.

The panel also held that the Commerce Department was mistaken in its conclusion that it was precluded from considering whether stumpage created any distortion from a competitive market in order to find a countervailable subsidy, particularly since it *had* used a market-distortion test — albeit one that was confused and unsupported by substantial evidence — in determining that log export restrictions were a subsidy. The panel directed the department to reconsider the distortion issues on remand.

In its remand decision, the Commerce Department gave at least lip service to the panel's instructions, but it affirmed its findings with respect to both stumpage and log export restrictions, and it *increased* the subsidy rate from 6.51 percent to 11.54 percent by recalculating the benefit supposedly resulting from the log export restrictions.

In the panel review of the remand decision, a majority found that it was unsupported by substantial evidence. The case was thus remanded for a second time with instructions to the department to issue a negative determination with respect to both stumpage and log export restraints. The two US members of the

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27 Although the department has authority to self-initiate AD and CVD investigations, it normally initiates investigations only upon petition by a domestic industry. Its decision to self-initiate in *Lumber III* was the first such action in a CVD case. Canada brought a GATT challenge to the self-initiation, as well as to the imposition of temporary duties (*United States — Measures Affecting the Export of Softwood Lumber from Canada* (II), BISD 40S/358). The GATT panel held that the self-initiation was valid, but that the imposition of temporary duties was not.

28 *Certain Softwood Lumber Products From Canada*, 57 Fed Reg 8800, 1992.

panel, however, stated that although they generally agreed with the majority's views on the merits of the case, they believed that a decision of the CAFC issued after the first panel decision had clarified the appropriate standard for judicial review of agency determinations and that under that standard they were bound to defer to the Commerce Department's interpretation of the facts and the law.[29]

The US government filed an Extraordinary Challenge. In addition to alleging that the panel majority had applied an incorrect standard of review, as it had in the two previous challenges (*Pork* and *Swine*), it also claimed that two Canadian panellists had violated the rules of conduct by failing to disclose information indicating at least the appearance of bias and, in one case, a serious conflict of interest.

Like the panel, the ECC split along national lines. The two Canadian members, Gordon Hart and Herbert Morgan, rejected both of the US claims. After examining the legal precedents the panel majority had relied on in concluding that the Commerce Department had erred, they said that the decision was not clearly wrong. With respect to the alleged conflict of interest, the Canadian judges concluded that there had been no material breach since the panellists had disclosed matters similar to those that had not been disclosed.

The US member of the committee filed a strongly worded dissent that attacked not only the majority decision of the panel but also the entire Chapter 19 process.

The US member of the committee, Malcolm Wilkey, a former judge of the US Court of Appeals for the District of Columbia Circuit, filed a lengthy and strongly worded dissent that attacked not only the majority decision of the panel but also the entire Chapter 19 process. He said "[T]he majority [panel] decision may violate more principles of appellate review of agency action than any other opinion by a reviewing body which I have ever read,"[30] a situation that, in his view, was an inevitable consequence of the deeply flawed panel process.[31] With respect to the conflict issue, Judge Wilkey concluded that had the US government known sooner about the work that the panellists or their law firms had performed for the Canadian government and for Canadian lumber producers, it would most likely have asked for them to be removed from the panel. He would, therefore, have reversed the panel decision on this ground also.

Subsequent Developments in Softwood Lumber

In the year after the Canadian victory in *Lumber III*, Congress amended the United States' CVD law in various ways (as part of the legislation that implemented the Uruguay Round agreements establishing the WTO). Two of the amendments are explicitly designed to reverse the key panel findings in *Lumber III*. One provides that the Commerce Department can base a finding of specificity on as few as one of

29 The US panellists' *volte-face* may seem surprising, since even the dissenting judge in the subsequent Extraordinary Challenge noted that the recent decision on which they had relied had simply restated existing law, rather than create new precedent.

30 *Lumber III*, dissenting ECC opinion, p. 41.

31 Judge Wilkey sarcastically asked why panel members should be expected to defer to administrative agency action when they are the experts who "know better than the lowly paid 'experts' over in the Commerce Department." He also observed that neither panel members nor Canadian judges sitting on ECCs understood the intricacies of US administrative law and, therefore, would not be capable of applying the proper standard of review. In his view, the Chapter 19 review system was so riddled with problems that it could not be fixed.

the four factors; the other that the department is not required to consider the effect of a subsidy in considering whether one exists.[32]

Shortly after passage of the amendments to the CVD law, with the threat of a new investigation looming,[33] Canada signed the Softwood Lumber Agreement with the United States. The agreement limited the volume of exports of softwood lumber to the United States through fees to be levied on exports over specified levels. The US softwood lumber industry agreed not to file a new CVD case while the agreement was in effect.

The agreement expired on March 31, 2001, and on April 2 members of the US industry filed a new CVD petition, as well as, for the first time, an AD petition. In April 2002, the Commerce Department issued final decisions imposing a CVD duty of almost 19 percent and an average AD duty of nearly 10 percent.[34]

Once again, the Commerce Department seemed to have acted inconsistently with its earlier decisions, in a way that appeared entirely results-oriented.

The decision caused outrage in Canada. Once again, the Commerce Department seemed to have acted inconsistently with its earlier decisions, in a way that appeared entirely results-oriented. For example, in each of the three previous CVD decisions, the department had rejected the US industry's request that it use stumpage prices in the United States as a benchmark, stating in *Lumber I* that because of the two countries' many differences in conditions, including species mix and operating costs, it would be arbitrary and capricious to use a crossborder comparison. In *Lumber III*, the department refused to accept the domestic industry's contention that the private Canadian benchmarks it had used were distorted by the presence of a large volume of government sales. Now it did a complete about-face in deciding that the private benchmarks in Canada were distorted and that its only recourse was to use the crossborder comparisons that it had rejected in each of the three previous cases. A cynical observer might conclude that the switch occurred because the department was able to concoct a subsidy finding from the in-country benchmarks in *Lumber III* but was unable to do so in *Lumber IV*.

The Canadian interests have filed Chapter 19 appeals against the CVD and AD determinations, as well as the ITC's finding of threat of injury. Canada has also filed appeals with the WTO against the Commerce Department's preliminary and final CVD determinations. The panel decision on the preliminary CVD determination.

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32 One commentator remarks that, as a result of the changes in the CVD law, "years of costly litigation [in *Lumber III*] came to naught" (Howse 1998, 15). However, although the amendments may have changed the outcome of future CVD litigation, the fact remains that, as a result of the binational panel's reversal of the Commerce Department's decision, the importers were refunded close to $1 billion of provisional duties — a good deal more than a pyrrhic victory. Also, of course, if the panel had not reversed the department's decision, softwood exports would have been subject to countervailing duties for a number of years.

Although the Softwood Lumber Agreement, described below, may have had an inhibiting effect on trade, it allowed a large amount of Canadian lumber into the United States duty free, and excess quantities were subject to a specified fee — vastly preferable to the uncertain liability for countervailing duties, whose amount is not determined for up to two years after importation.

33 The US industry was reported to be within days of filing a new petition.

34 *Certain Softwood Lumber Products from Canada*, 67 Fed Reg 15545, 2002, (CVD) and *Certain Softwood Lumber Products from Canada*, 67 Fed Reg 15539, 2002, (AD) (referred to collectively as *Lumber IV*). Six producers who were individually investigated received AD margins ranging from 2.26 percent to 15.83 percent. The remaining producers received the average margin of 9.67 percent.

although not public at the time of writing, has reportedly held that the use of a crossborder benchmark was inconsistent with the WTO.[35]

Chapter 19 Developments after Lumber III

The protracted Lumber III *litigation and Judge Wilkey's biting dissent condemning the entire Chapter 19 process created a great deal of concern about the system.*

The protracted *Lumber III* litigation and Judge Wilkey's biting dissent condemning the entire Chapter 19 process created a great deal of concern about the system. Because of the enormous volume of trade involved, *Lumber III* received much attention in the media and in political circles. The US lumber industry is considered one of the politically most powerful industries in the country.[36] What appeared to its supporters to be a well-reasoned decision by the Commerce Department had been overturned by a panel voting along national lines, and the ECC had upheld the panel, again on national lines. In the supporters' view, the panel majority had delved far more deeply into the intricacies of specificity and market distortion — the opinions in the two panel decisions total 370 pages — than was appropriate under the limited standard of review. They also observed that, a few months after the *Lumber III* panel decision, another Chapter 19 panel[37] unanimously agreed that the Commerce Department could base a specificity finding solely on a small number of recipients. The fact that two panels could reach such divergent conclusions on such a key issue suggested that the state of the law was so unclear that the *Lumber III* panel should also have left the matter to the department's discretion.

Some were concerned that the controversy surrounding the *Lumber III* decision — and particularly Judge Wilkey's strong attack on the entire Chapter 19 system, which he repeated in congressional testimony (United States 1995a) — might have a chilling effect on the willingness of panellists to question agency decisions in future cases. However, panellists have been quite as ready as before to remand cases to the Commerce Department, which suggests they have not felt inhibited. In seven of the eight Chapter 19 decisions involving Commerce decisions against Canadian products issued since *Lumber III*, the panels upheld some or all of the Canadian arguments and remanded to the department.[38] This proportion is virtually the same as that of cases remanded before *Lumber III*. (In the eighth decision, the panel, while upholding the department, criticized its actions.) Six of the eight completed panel reviews of department decisions involving Mexican products were remanded, and several of the remands resulted in significant reductions in duties.

This fairly interventionist approach by the binational panels has not, however, generated the level of controversy created by *Pork*, *Live Swine*, and *Lumber III*. There are several reasons. First, none of the post–*Lumber III* panel reviews resulted in the revocation of an AD or CVD order, unlike the case in *Pork* and *Lumber III*. Moreover, most of the reviews have been of AD, rather than CVD, decisions, and most involved relatively small volumes of trade. As explained earlier, AD cases, which involve only

35 "U.S. likely to appeal unfavorable WTO ruling on lumber case," *Inside U.S. Trade*, August 2, 2002.

36 In March 2001, shortly before the filing of the petitions in *Lumber IV*, 51 senators wrote to the secretary of commerce urging him to resolve "the problem of subsidized lumber imports from Canada." ("Text: Senate Letter Supports Lumber Deal," *Inside US Trade*, March 2, 2001.)

37 *Pure and Alloy Magnesium from Canada*, USA-92-1904-03 (1994).

38 In five of the cases, the duties were reduced, though in some cases by quite small amounts.

Table 1: ***US Antidumping and Countervailing Duty Investigations and Orders, 1994–2002***

Country/Region	Investigations, 1994–2002	Orders, 1994–2002	Annual Value of US Imports, 2000	Value ÷ Investigations	Value ÷ Orders	Orders in Effect 2002	Value ÷ Orders in Effect
	(number)			*(US$ billions)*		*(number)*	*(US$ billions)*
Canada	13	3	230	18.0	77.0	10	23.0
Mexico	11	3	135	14.0	45.0	9	15.0
Japan	28	19	145	5.0	8.5	32	5.0
European Union	65	21	265	4.0	13.0	44	6.0
South America	27	13	40	1.5	3.0	26	1.5

Note: Investigations or orders against the same product from more than one EU or South American country were counted here only once. Data in the first two columns are through May 2002. Money amounts are denominated in 2000 US dollars.

the actions of private companies, usually generate less controversy than CVD cases, which involve challenges to government programs. Also, most of the post–*Lumber III* panel decisions have involved administrative reviews of AD or CVD orders, rather than appeals from original investigations, and thus tend to involve rather technical, relatively uncontentious issues.

The paucity of panel reviews involving new AD or CVD decisions reflects the rather surprising fact that the Commerce Department has entered only a handful of orders against Canada and Mexico in recent years. Between 1994 and May 2002, only 13 AD and CVD cases were filed against Canada, resulting in only three orders (of which two were the AD and CVD orders in *Lumber IV*). In the same period, 11 AD (and no CVD) cases were filed against Mexico, also resulting in three orders. In part, the small number of investigations and orders may reflect the strength of the US economy for much of this period, which would have made it difficult for a domestic industry to prove that it had been injured by imports. As Table 1 shows, however, the number of cases filed and orders entered against other countries and regions during this period, as well as the total number of orders in effect, was far higher in proportion to trade volumes. For example, seven times as many AD and CVD orders were entered against imports from the European Union (EU) than against imports from Canada, although the value of total US imports from the EU was not much higher than that of those from Canada. Imports from the EU are currently subject to more than four times as many outstanding orders as are imports from Canada. The trend for imports from Mexico is similar.

This rather startling contrast suggests that there has been a secular decline in actions against Canada and Mexico, which may be the result of the growing integration of the economies of the NAFTA members.

The WTO Process Compared with Chapter 19

Many of the substantive obligations the NAFTA imposes on the parties to it are similar or identical to those created by the WTO agreements. Thus, in many situations, a NAFTA member has the choice of challenging the action of another member under the dispute-resolution procedures of Chapter 20 NAFTA or those of the

WTO.[39] AD and CVD cases do not present this choice, however, since the NAFTA contains no substantive provisions concerning AD and CVD laws similar to those contained in Article VI of the GATT 1994 and the Uruguay Round Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade (AD) and the Agreement on Subsidies and Countervailing Measures. Chapter 19 simply establishes a mechanism for the parties to appeal an agency investigation under *domestic* law. Thus, the only way one NAFTA member can challenge the *international* validity of another member's AD or CVD law is through the WTO dispute-resolution mechanism.

The only way one NAFTA member can challenge the international validity of another member's AD or CVD law is through the WTO dispute-resolution mechanism.

As we have seen, Chapter 19 provides an automatic right of appeal from decisions made by domestic agencies. The binational panels are required to apply the national law of the agency's country, and provisions of the GATT and the relevant WTO agreements are not directly relevant. Thus, an appeal under Chapter 19 is limited to the question of whether the agency decision complies with the applicable domestic law. A WTO appeal, on the other hand, involves the question of whether a domestic law (or a decision under that law) meets the applicable WTO requirements.

Although one commentator (Howse 1998) describes the two AD and CVD appeal routes — NAFTA Chapter 19 and the WTO — as alternatives, in fact they are not. Both routes can be pursued — Chapter 19 by the parties to the AD or CVD case, and the WTO by the government — simultaneously or consecutively.

For a number of reasons, a private party to an AD or CVD case who believes that the agency decision is incorrect normally would not wish to forfeit its Chapter 19 appeal rights even if its government is pursuing a WTO appeal against the same decision. The only situation in which this statement might not hold would be where the domestic law was so clear that a Chapter 19 appeal would be fruitless but that same law arguably violated the relevant WTO Agreement.

Why would a party normally not wish to forfeit its Chapter 19 appeal rights? First, a Chapter 19 appeal is automatic and is litigated by the private party itself. By contrast, private parties cannot bring cases in the WTO, so the party must first persuade its government to initiate WTO proceedings. The government may be reluctant to spend its resources on such proceedings, particularly if the volume of trade involved is small or the case appears weak. Even if the private party does manage to persuade its government to press an appeal, it will have to stand by and watch as the government litigates the case, perhaps not to its entire satisfaction. The government may decide not to press a particular argument favoured by the private party because of a conflict with a position taken by the government in another case or with the country's own AD or CVD practice.[40]

Second, relief is more certain under Chapter 19. If the appellant prevails, the panel will direct the agency to correct the flaws in its decision, even to the extent of revoking the AD or CVD order (as happened in *Pork* and *Lumber III*). Excess duties already paid will be refunded. Under WTO procedures, on the other hand, the

39 Article 2006.6 of the NAFTA requires the complainant to make this choice. It cannot pursue a claim under Chapter 20 and in the WTO at the same time.

40 For example, the United States reportedly refused to raise a "like product" argument favoured by the domestic industry in a WTO challenge to a Mexican AD finding against high fructose corn syrup from the United States because the US practice in this respect was very similar to the Mexican practice that the industry wished to challenge.

losing country has the option of amending the measure found at fault, of offering compensation in the form of other concessions, or of facing retaliation. If it chooses compensation or retaliation, the industry on whose behalf the case was brought will receive no benefit. Even if the loser withdraws the AD or CVD measure, US law precludes refund of any antidumping or countervailing duties already paid.[41]

Third, because the domestic AD and CVD law is far more detailed than the WTO agreements, Chapter 19 often offers greater scope for appeal.

The Chapter 19 process is, in theory, a good deal faster than WTO proceedings.

Finally, the Chapter 19 process is, in theory, a good deal faster than WTO proceedings. The Chapter 19 procedures require a panel decision to be issued within 315 days of the filing of the appeal, and although the remand process slows the ultimate relief, most remands are issued within three months of the panel decision. On the other hand, WTO dispute resolution normally takes 15 to 17 months for a decision, and a further 15 months for implementation. However, as discussed later in this paper, the Chapter 19 panel process has been seriously delayed in the last few years by failure to appoint panellists in a timely fashion.[42]

The WTO dispute-resolution process does, however, have some advantages. Unlike the Chapter 19 process, it can be begun before conclusion of the agency proceedings. Even though the time required for litigation means that a NAFTA panel decision is not normally be issued before the agency investigation is concluded, the mere existence of a WTO proceeding may encourage the agency to proceed with more circumspection than usual. Shortly after the Commerce Department began its investigation in *Lumber III*, Canada brought an action in the GATT challenging that initiation as well as the collection of provisional duties before the date of initiation. The GATT panel found that the initiation was valid but that the collection of provisional duties was not.[43] The duties were ultimately refunded to the importers.[44]

The WTO dispute-settlement process can even be used to challenge a provision of another member's law before it has been invoked in an agency proceeding. In a case filed by Canada against the United States, a WTO panel recently held that export restraints could not constitute subsidies under the WTO Subsidy and Countervailing Measures Agreement.[45] Canada had challenged the mere existence

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41 As discussed below, Canada recently challenged this provision in the WTO.

42 In one case in which both Chapter 19 and WTO proceedings were filed with respect to a Mexican antidumping order against a US import, the first Chapter 19 panel report was not issued until three and a half years later, but the WTO panel report took only 17 months. *Imports of High Fructose Corn Syrup Originating in the United States of America*, Mex-USA-98-1904-01; *Mexico — Anti-Dumping Investigation of High Fructose Corn Syrup from the United States*, WT/DS 132/R. The delay in the Chapter 19 proceeding was caused by the failure of Mexico to name panellists for nearly two years.

43 *United States — Measures Affecting the Export of Softwood Lumber from Canada (II)*, BISD 40S/358.

44 There are other examples. Mexico requested consultations with the United States concerning an AD investigation of tomatoes after it had been initiated, but the matter was dropped after the Mexican industry entered a suspension agreement with the United States (*United States — Anti-Dumping Investigation Regarding Imports of Fresh or Chilled Tomatoes from Mexico*, WT/DS49). Canada requested consultations with the United States concerning the initiation of a CVD investigation of cattle, but the matter has not been pursued since the investigation resulted in a negative finding. *United States — Countervailing Duty Investigation with Respect to Live Cattle from Canada*, WT/DS167.

45 *United States — Measures Treating Export Restraints as Subsidies*, WT/DS194 (2001). The panel held that the US measures Canada challenged did not require export restraints to be treated as subsidies, so that the United States did not have to take any action to implement the decision. Since neither side appealed, the WTO Dispute Settlement Body adopted the panel decision. Although the United...

of US measures that it claimed required treatment of export restraints as subsidies, rather than their application in a particular case.[46]

Evaluation of Chapter 19

Most commentators agree that the Chapter 19 system has worked well.

Most commentators agree that the Chapter 19 system has worked well. The vast majority of panel opinions have been unanimous, and in only one case — *Lumber III* — was the split along national lines. A few years ago, when the US General Accounting Office conducted a study of Chapter 19 (United States 1995a), a number of practitioners commented that the panels tended to review the facts more carefully than the CIT, that they held longer hearings and asked more probing and far-ranging questions, and that they wrote longer and more detailed opinions.[47] In 1997, officials from each of the three NAFTA countries, as well as private sector representatives, stated that they viewed the system as working well (United States 1997). Thus, any concerns that the US government may have had about the system after *Lumber III* seem to have been allayed.

The issues relevant to an evaluation of the system include the standard of review, the extent to which the system is perceived as producing fair results, the timeliness of decisions, any perception of national bias on the part of the panellists, and the finality of the process.

Standard of Review

A key issue in each of the three Extraordinary Challenges completed to date was the proper standard of review the binational panels were to apply, and in each challenge, the United States argued unsuccessfully that the panels had overreached themselves. Although the statutory standard — whether the agency decision is "unsupported by substantial evidence on the record or otherwise not in accordance with law" (*Tariff Act of 1930*, as amended, section 516A(b)(1)(B)) — is easy to state, it is a fairly slippery concept in practice, and many practitioners believe that different CIT judges apply the standards differently. Some members of the court give great

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Note 45 - cont'd.

...States claimed victory, because it was not required to change its law, Canada also saw the decision as a win because it places the United States on notice that it will violate the SCM Agreement if it countervails against export restraints in the future. Although not styled as such, the case was clearly a preemptive strike against any attempt by the United States to countervail against Canadian export restraints on logs in the new softwood lumber CVD case that was anticipated at the time. In fact, the Commerce Department did not specifically countervail against log export restraints in *Lumber IV*, although it did say that its crossborder method of calculating the stumpage benefit would also take account of any benefit received from log export restraints.

46 In a case filed by Canada, a panel recently declined to rule on a provision of US law under which, if the WTO finds that an AD or CVD order is inconsistent with the relevant WTO agreement, duties already collected under the order are not to be refunded. The panel's ground was that the law was not mandatory (*United States — Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS/221/1) and, therefore, that it was premature to rule on it until the United States had taken action under the law.

47 The recent panel decision in *Gray Portland Cement and Clinker from Mexico*, USA-97-1904-01, 1999, for example, was nearly 300 pages long, not including the dissenting opinion and appendices. Few if any, CIT or CAFC opinions run anywhere near this length.

deference to the Commerce Department and the ITC; others examine the agencies' practices in considerable detail, and appear to come close to substituting their own judgment for that of the agency, which they are not supposed to do.

One commentator, after a painstaking analysis of a large number of binational panel decisions, concludes that the panels, while imposing a rigorous standard of review — albeit one that is well within the norms established by the courts — have applied a more consistent standard than the CIT. (Pan 1999, 407). This consistent approach has, in his view, helped to contribute to the desirable goal of a stable and predictable AD and CVD regime. The same study concludes that there is no evidence that any of the panels failed to undertake a thorough review of the law, and that they have generally acted quite conservatively. Frequently their reason for remanding decisions to the Commerce Department was not outright disagreement with its conclusions but rather that its reasoning was inadequate or that it had changed a policy without explanation.

Increased Fairness

Has Chapter 19 resulted in fairer administration of the United States' AD and CVD laws? From Canada's and Mexico's point of view, the answer seems to be yes.

Has Chapter 19 resulted in fairer administration of the US AD and CVD laws? From Canada's and Mexico's point of view, the answer seems to be yes.

Two panel decisions involving imports from Canada — *Pork* and *Lumber III* — resulted in outright reversals of US agency decisions that favoured the domestic industries. These victories were important for Canada, not least because both were high-profile cases involving significant volumes of trade. Apart from these cases, a number of panel decisions against Commerce Department decisions resulted in lower duties.

Overall, FTA and NAFTA panels have completed reviews of 18 AD and CVD decisions by the Commerce Department involving Canadian imports. In 12 of these cases, the panel decisions required the department to reduce the duties it had imposed.[48] Although no one can say with certainty what the results would have been had the decisions been reviewed by the CIT instead of by Chapter 19 panels, a General Accounting Office study (United States 1995a) shows that, between 1989 and 1994, the CIT was remanding only about one-third of its cases, whereas FTA panels remanded nearly two-thirds of the cases brought by Canadian exporters. Since then, NAFTA panels have remanded 10 out of the 12 completed cases to come before them, an even higher ratio. Thus, it appears that the panel system has improved the Canadian chance of success against the Commerce Department.

Canada has also fared reasonably well in ITC cases before Chapter 19 panels. Five such decisions have been appealed. As described above, *Pork* resulted in an outright reversal, and the panel appeal of the injury determination in *Lumber III* would almost certainly have resulted in a reversal had the appeal not been rendered moot by the negative determination the Commerce Department issued at the direction of the binational panel in the companion appeal. Although these numbers

48 In some of these cases, the reduction was not large. But a number of cases involved significant reductions, and in one case —*Lumber IV* — the duty was eliminated altogether. One study reports that the average duty reduction in the 13 appeals between 1989 and 1995 under Chapter 19 of the FTA involving Commerce Department decisions was almost 30 percent (Mercury 1995, 530).

may be too small to be statistically significant, the rate of reversal is much higher than in the CIT, which rarely reverses ITC decisions.

Mexico, too, has achieved a measure of success. As we have seen, a number of the Chapter 19 cases involving United States' AD and CVD findings against Mexican imports resulted in lower duties. In one case, the two exporters who had appealed were relieved of all duties as a result of the panel finding, and in several other cases, the duty reductions were quite substantial.

Quite aside from the actual results, an important question is whether the system is perceived to operate in a fair and impartial manner. A decision by five panellists, all of whom are expert in trade law, seems, by its very nature, to have less of a role-of-the-dice flavour and, therefore, may be more reassuring to the parties than a decision by a single judge who may have had no first-hand experience with the intricacies of an AD or CVD investigation. As already stated, the Chapter 19 panellists are almost universally seen as working diligently to reach the right decisions. The fact that the vast majority of their decisions have been unanimous (see below) supports the view that the system is operating well. The fact that six NAFTA appeals from AD and CVD decisions of the United States were filed in 2001 and another six in the first five months of 2002 indicates that parties still have faith in the system.

Timeliness

The panel system has succeeded in speeding up the review process somewhat, at least in the earlier years, but not as much as had been expected.

Has the panel system succeeded in speeding up the review process, as the FTA's drafters hoped? The answer is somewhat, at least in the earlier years, but not as much as had been expected. According to the GAO study referred to above (United States 1995a), during the 1989–94 period, the CIT took an average of 734 days to complete its review of agency decisions and cases appealed to the CAFC took 1,210 days. The panel reviews in this period, on the other hand, were completed in an average of 511 days, including the time taken for appeals to ECC.

Delays in Chapter 19 proceedings have become pronounced in recent years, however, because of the growing difficulty of assembling panels. Only three panel decisions have been issued in the past two years. One of these appeared three years after the filing of the appeal, and the other two were more than six months late. Two pending appeals involving Canadian products are already more than six months overdue.

The delays have been even more serious in appeals involving imports from Mexico. Two cases that are awaiting decision were filed in April 1998, and another three years ago. In March 2000, the United States filed a request for an ECC in an appeal involving Mexican cement, but the committee has not yet been formed, reportedly because of Mexico's failure to nominate a member.

The difficulty of assembling panels may be due in part to the very low compensation of members, which was only recently increased and is still not high by the standards of the private bar, which provides many of the panellists. It also results, however, from the toughened conflict-of-interest rules that were introduced with the NAFTA, as well as the greater sensitivity to the possibilities for such conflict after the *Lumber III* decision.[49] The conflict issue has resulted in the need

49 No panellist would wish to go through the public scrutiny of his or her actions of the kind that occurred during the Extraordinary Challenge in *Lumber III*.

for more time to assemble panels, and in some cases it has forced panellists to withdraw during a case.[50] Withdrawals cause further delay while substitute panellists are found. Particularly in Canada and Mexico, where most trade law practitioners belong to a handful of law firms, the tight rules make it difficult to avoid at least nominal conflicts. Commentators have suggested alleviating this problem by establishing a permanent body of panellists. However, this approach could raise serious questions under the US constitution.[51] Moreover, many people feel that one of the strengths of the present system is the involvement of active practitioners, who are familiar with the nuances of AD and CVD law, as well as recent developments in the practice, and are therefore more alert to aberrational behaviour by the agencies.

Lack of National Bias

Concerns have arisen from time to time about the possibility of national bias in the panel system. Yet only in Lumber III *has a panel split along national lines.*

Concerns have arisen from time to time about the possibility of national bias in the panel system. Yet only in *Lumber III* has a panel split along national lines.[52] Of the more than 50 FTA and NAFTA Chapter 19 opinions reviewing US agency decisions,[53] all but seven were unanimous. In five, there was a single dissent, and in one case other than *Lumber III* there were two dissents but the division was not along national lines.

Perhaps it is unfortunate that in each of the three cases that have been subject to Extraordinary Challenges, a majority of both the panel and the ECC were Canadians. The fact remains that, except in *Lumber III*, at least one US member of each panel voted with the majority. And even in *Lumber III*, as explained above, the first remand to the Commerce Department, holding that it had erred with respect both to stumpage and log exports, was unanimous. In the second remand decision, the two US panellists, while generally agreeing with the majority on the merits, dissented simply on the ground that in their view an intervening decision of the CAFC had narrowed the applicable standard of review. The majority took the view that the CAFC decision had merely restated the existing standard, as did ECC member Wilkey in his dissenting opinion. Moreover, each of the three panel remands of the ITC injury determination, the last of which would almost certainly have resulted in a negative determination, were unanimous. Thus, if the DOC decision had not been overturned, the CVD order would have been overturned by a unanimous panel.

Thus, however one views other criticisms of the Chapter 19 system, the concerns expressed about national bias and conflicts of interest seem seriously misplaced. A conflict allegation has only been made in one case, the vast majority of the panel decisions have been unanimous, and only once has a panel split on national lines.

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50 A conflict can occur when a panellist changes law firms. Also, because the conflict rules cover not just client conflicts but also issue conflicts, an attorney serving on a panel who is subsequently retained on a case involving the same issue is required to resign from the panel. According to the GAO study (United States 1995a), panellists withdrew before completion of the case in one-third of the FTA Chapter 19 appeals involving US agency decisions. These changes added an average of nearly 250 days to the time needed to complete the process.

51 The appointment of permanent panellists without Senate confirmation might violate the appointments clause of Article II, Section 2. (See Pan 1999, 389.)

52 In *Porcelain-on-Steel Cookware from Mexico* (USA-95-1904-01), the two Mexican panellists would have dissented on one issue but the appellant had failed to raise it.

53 In several cases the panels issued more than one opinion.

Indeed, in 1997 officials of the three NAFTA countries were reported as saying that in their view, "concerns about panels voting along national lines...have proved to be unfounded" (United States 1997).

Need to Relitigate Issues

The last criterion is the finality of the Chapter 19 panel decisions. Here the NAFTA dispute-resolution method scores less well than it does against other benchmarks. An irksome aspect of the system is the Commerce Department's practice of refusing to follow binational panel rulings in a particular case, even in subsequent administrative reviews of the same order, compelling the respondent to appeal the same issue to a panel in every review.[54] To have to fight the same battle year after year is obviously frustrating, as well as expensive, for a respondent in an AD or CVD case, who has won the issue on appeal before a panel of five experts.

It is fair to say, however, that the department similarly regards CIT decisions as binding only in the actual segment of the case (investigation or administrative review). Thus, non-NAFTA parties can find themselves in the same position with respect to CIT appeals.

Conclusion

The system has worked well and, perhaps equally important, has been perceived to work well.

Given the advantages of Chapter 19, it is clearly in Canada's interest to ensure that the system continues to offer a practical avenue of appeal for Canadian exporters who become ensnared in the United States' AD and CVD quagmire. The system has worked well and, perhaps equally important, has been perceived to work well. It has provided a useful safety valve that has released some of the steam generated by a highly contentious area of crossborder trade relations.

The recent delays in the process resulting from the difficulty in assembling panels, while so far mainly affecting cases involving imports from Mexico, could begin to affect Canadian appeals as well. This situation would negate one of the principal reasons for establishing the process — to provide an appeal process faster than that provided by the courts. Uncertainty would be prolonged and, despite the less favourable track record in the CIT, some Canadian exporters might be tempted to take their appeals there instead of to a Chapter 19 panel in the hope of at least obtaining a speedier decision.

No easy solution seems to exist. The delays are caused by the time required to create panels, rather than by the panels themselves once established. The recent

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54 This situation occurred in *Corrosion-Resistant Carbon Flat Steel Products from Canada*, USA-97-1904-3 (*Decision of the Panel on the Determination on Remand*, January 20, 1999.). The panel had directed the department to recalculate the respondent's cost of production in one respect, on the ground that the department's approach was unlawful. The department complied with the direction but indicated "rather categorically" (in the words of the panel) that it disagreed with the panel's position. The panel noted that, although it would cease to exist when its review was completed, future administrative reviews lay ahead for the respondent, and in them the department would almost certainly continue to apply the approach that the panel had rejected. This is indeed exactly what happened, and a new Chapter 19 panel remanded the department's decision in the next review on the same issue (*Corrosion-Resistant Carbon Steel Flat Products from Canada*, USA-CDA-98-1904-1).

increase in compensation may help to some extent but will do nothing to ease the conflict issue. Yet, as we have seen, eliminating this issue by establishing a permanent panel might raise constitutional issues in the United States and would deprive the system of one of its present strengths: the involvement of active members of the trade bars in the three countries. Perhaps limiting the panels to three members might reduce the number of conflicts of interest, but it would increase the likelihood of national splits, undermining confidence in the system.

Were it not for softwood lumber, Canada would not have much to complain about the way in which it is now being affected by the US AD and CVD laws. Only six other Canadian products are currently subject to AD or CVD orders, and, in most cases, the value of imports affected is low, and the current rate of duty assessed quite small.

The current *Lumber IV* is, of course, the massive exception, involving billions of dollars worth of imports and a high initial duty rate. Although Chapter 19 gave Canada an absolute victory in *Lumber III*, it did not prevent Congress from amending the law in a way designed to make it easier for the US domestic industry to prevail in the next case. Nor did it prevent the domestic industry from filing a new case. But Chapter 19 was never intended to achieve these goals. All Chapter 19 was designed to do is to provide an alternative avenue of appeal from AD and CVD decisions. While Canada sought in the free trade negotiations to eliminate AD and CVD actions altogether on Canada-US trade, the United States rejected this "big" proposal. Although successful within its own terms, Chapter 19 has not, of course, met the much larger objective that Canada failed to achieve. For many Canadians, this remains the only basis for measuring a successful trade regime.

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The Canadian dream of eliminating AD and CVD laws for Canada-US trade might be possible in the long run, but only as a result of a much closer economic union than either country is now contemplating. Congress continues to guard jealously the right of US industries to bring AD and CVD actions against all trading partners, including Canada and Mexico.

A number of incremental steps could be taken that, while not removing AD and CVD laws from Canada-US trade altogether, would alleviate their impact. For example, it has been suggested that the standards might be raised in cases between members of a free trade area (Herzstein 1989). The *de minimis* level of dumping and subsidization — the level below which no duties are levied — could be raised from the current 2 percent in AD cases and 1 percent in CVD cases to, say, 10 percent. The level of injury required to sustain an AD or CVD finding could be raised from the current "material injury" to the considerably higher "serious injury" standard required in safeguard actions. And the causation standard, linking the dumped or subsidized imports with the injury, could be tightened, requiring that the imports be a "substantial" cause of the injury, rather than simply "a" cause, as under current law. The president could be given discretion not to enforce an AD or CVD order where the order would be contrary to the broader political and economic interests of the free trade area — the type of discretion the president now has under safeguards law. These changes would discourage the filing of cases by domestic industries that did not believe they could meet the new standards, and would result in a greater number of negative findings.

Another approach, suggested by former Canadian trade official Michael Hart, is a common technical institution that would provide the analysis and findings for national administrative authorities for measuring dumping and subsidization for all cases under the national laws of Canada and the United States. Although national laws would remain distinct, the binational staff would provide a common analytic team.

Unfortunately, even these relatively modest steps are unthinkable in the current climate. Washington's recent safeguards action on steel shows that pandering to domestic interests is far more important to the Bush administration than the free trade principles to which it has given lip service. And even if the administration were in favour of some liberalization of the AD and CVD regimes as they apply to trade with Canada, Congress — which opposed even having antidumping on the agenda for the Doha Ministerial meeting — would never agree.

In the meantime, Canada's only immediate recourse seems to be to take full advantage of its rights to have the United States' AD and CVD decisions against Canadian imports carefully scrutinized by Chapter 19 and WTO panels — remedies that have proved quite effective in the past and no doubt will continue to be in the future.

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